90-1849
No. _____

FILED
JAN 22 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SONNY B. WEBB,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY
LEE M. THOMAS (WAS), WILLIAM REILLY (NOW)
ADMINISTRATOR

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX

SONNY B. WEBB, PRO SE
PETITIONER FOR PETITIONER
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

ENTERED ON DOCKET R79(A) FILED
APR 27, 1990 By: S/CS :Apr 27,1990

SONNY B. WEBB,

Plaintiff,

v. :C-89-18-D

WILLIAM REILLY
Administrator, Environmental
Protection Agency

Defendant.

JUDGMENT

For the reasons set forth in a Memorandum Opinion entered contemporaneously herewith, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant's motion to dismiss is GRANTED as to all claims. This case is dismissed with prejudice, and both sides are directed to pay their respective costs.

s/Richard C. Erwin
United States District Judge

April 27, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

FILED
Apr 27,1990

SONNY B. WEBB

Plaintiff,

v.

C-89-18-D

WILLIAM REILLY
Administrator, Environmental Protection Agency

Defendant.

MEMORANDUM OPINION

ERWIN, Chief Judge

This matter is before the court upon defendant William Reilly's motion to dismiss plaintiff's claims pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. The parties have fully briefed the issues, and the matter is now ready for a ruling. The court, having considered the positions of both parties, grants defendant's, motion as to all claims.

Factual Background

Plaintiff Sonny B. Webb is presently employed as an inventory management specialist with the Environmental Protection Agency (herinafter "the agency") at the agency's Research Triangle Park facility. Plaintiff is employed specifically in the Contract Property Section, Property and Supply Management Branch. Plaintiff has been employed by the agency since November 24, 1974. Since employment with the agency, plaintiff has served as an inventory management assistant, a supply clerk, and as a computer programmer. In April 1978, plaintiff was promoted to computer programmer based upon the importance of his computer duties at that time.

In May 1985, plaintiff's division came under the direction of a new branch

chief who reviewed the position descriptions of all the employees in the branch. After reviewing plaintiff's duties and responsibilities with him, the branch chief determined that plaintiff's job description was not accurate. Plaintiff's description was subsequently rewritten and he was laterally reassigned to the position of Inventory Management Specialist which became effective October 13, 1985. This reassignment was made at the same salary as plaintiff's previous position.

Shortly thereafter, plaintiff contacted an Equal Employment Opportunity counselor with the belief that his reclassification was based on descrimination. When the counselor was unable to resolve the matter informally, plaintiff, pursuant to the applicable regulations, filed a formal complaint of

discrimination on Janaury 31, 1986. Based upon an investigative record, the Equal Employment Opportunity Commission issued a proposed disposition of the plaintiff's complaint on January 14, 1987 finding no discrimination. This finding was confirmed on appeal by an EEOC administrative judge and the EEOC's Office of Review and Appeals.

On January 6, 1989, plaintiff filed his complaint before this court alleging discrimination under Title VII of the Civil Rights Act of 1964. Plaintiff, however, in his federal lawsuit, does not limit his claim to that of his 1985 job reclassification, but alleges discrimination dating back to events occurring as early as 1976.

Discussion

Claims Arising Before 1985 Reclassification

The defendant moves to dismiss all

claims which are based upon events occurring before the 1985 reclassification incident. Plaintiff claims that he suffered a great deal of "pressure and opposition" from management at the agency on occasions as early as 1976. Plaintiff claims that he received this pressure from the agency because (1) he is Black, (2) he is a Disciple of Christ, and (3) he has a speech impediment. Defendant, however, denies any discriminatory treatment of the plaintiff on the agency's part.

Defendant contends that plaintiff is prohibited from bringing any claims that arose before the 1985 reclassification incident. Defendant bases his position on Title VII of the Civil Rights Act of 1964, which requires the complainant to bring "to the attention of the Equal Employment Opportunity Counselor the matter causing him to

believe he had been discriminated against within 30 calendar days of the date of that matter." 29 C.F.R. §1613.214(a)(1)(i).

If the complaint is not resolved informally with the counselor, the complainant or his representative must submit his written complaint to an appropriate official within fifteen days of the date of his final interview with the EEO counselor. 29 C.F.R. § 1613.214 (a)(1)(ii).

The law is clear in this instance that if an employee fails to exhaust the above-mentioned procedures, there are grounds for dismissal of his action; the rationale being that the exhaustion of administrative remedies is a jurisdictional prerequisite to the maintenance of a judicial action. See Woodard v. Lehman, 717 F. 2d 909 (4th Cir. 1983); Johnson v. Bergland,

614 F.2d 415 (5th Cir. 1980).

In the present case, the only documented EEOC complaint is that referring to the 1985 reclassification incident. Defendant's brief in support of his motion to dismiss includes the supporting affidavit of Dianne W. Laws, Director of the agency's Area Office of Civil Rights. Ms. Laws' affidavit contains the following:

> 3. I have searched the historical records of the EPA Area Office of Civil Rights at Research Triangle Park and have found no record of any formal complaint of discrimination, filed by Mr. Webb prior to November 8, 1985.... All formal complaints are required to be in writing and signed by the complainant.
>
> 4. I have contacted . . . the former Director of the EPA Area Office of Civil Rights at Research Triangle Park, who had no memory or record of a formal discrimination complaint allegedly filed by Mr. Webb in December of 1977.
>
> 5. I have contacted the EPA Headquarter's Office of Civil Rights in Washington D.C. and have

> learned that the Agency's records of formal discrimination complaints do not include any formal discrimination complaint dated December 7, 1977 as alleged by Mr. Webb. In the ordinary course of processing formal complaints of discrimination, copies are maintained at EPA Headquarter's Office of Civil Rights.

(Laws affidavit).

Plaintiff, in an attempt to contradict the defendant, offers the affidavit of John Jefferies, an EEO counselor at Research Triangle Park. Although Mr. Jefferies affirms that he provided EEO counseling to the plaintiff in 1977, he makes no mention of a formal complaint being filed at that time. To the contrary, Jefferies' affidavit states that after terminating counseling with plaintiff, he was informed that a formal complaint had been filed. He further testifies that this counseling was terminated in 1986.

In light of these considerations,

it is this court's determination that defendant's motion to dismiss is proper as to any and all claims arising before the 1985 reclassification incident. Without evidence of a formal complaint having been filed within the thirty day statutory period, this court must conclude that plaintiff has failed to exhaust his administrative remedies and that his claims must be dismissed.

The 1985 Reclassification

The major portion of plaintiff's claims revolve around the 1985 reclassification of his job title from that of Computer Programmer to Inventory Management Specialist. Plaintiff was reclassified due to an evaluation of the positions in the Supply Management Branch under the direction of a new branch manager. Plaintiff contends that this reclassification was motivated by

discrimination in spite of the fact that the new classification afforded plaintiff the same grade status and salary as did his old position.

Upon motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure, all the allegations and conclusions reasonably drawn from the complaint are presumed to be true. However, even given this presumption, plaintiff has not presented enough evidence to establish a prima faci case of discrimination against the agency as to either race, religion or handicap.

This court concurs with the judgment of the EEOC's Office of Review and Appeals that the agency did articulate legitimate, nondiscriminatory reasons for its actions as required by the United States Supreme Court in Furnco Construction Corp. v. Waters, 438

U.S. 567 (1978). In the absence of further evidence by plaintiff showing that the reasons given for the agency's actions were merely pretextual, the plaintiff's discrimination claim must fail.

Conclusion

In light of the foregoing, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant's motion to dismiss is GRANTED as to all of plaintiff's claims. A Judgment will be filed contemporaneously herewith in keeping with this Memorandum Opinion.

s/Richard C. Erwin
United States District Judge

April 27, 1990

UNITED STATES COURT OF APPEALS
For the Fourth Court

No. 90-2106

SONNY BOY WEBB,

Plaintiff - Appellant,

versus

ENVIRONMENTAL PROTECTION AGENCY; LEE M. THOMAS; WILLIAM REILLY,

Defendants - Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Richard C. Erwin, Chief District Judge. (CA-89-18-D-C)

Submitted: August 27, 1990 Decided: September 27, 1990

Before SPROUSE and WILKINS, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

Sonny Boy Webb, Appellant Pro Se. Harry L. Hobgood, Assistant United States Attorney, Greensboro, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Sonny Boy Webb instituted this action under Title VII of the Civil Rights of 1964, alleging race, religion, and handicap discrimination in his employment from 1976 to 1985. The defendant, the Environmental Protection Agency, filed a motion to dismiss under Fed. R. Civ. P. 12(b) as to all claims which were based upon events prior to 1985 because Webb had failed to exhaust his administrative remedies as to those claims.* The district court granted the defendant's motion and also dismissed, sua sponte, the remainder of the complaint for failure to state a claim upon which relief could be granted.

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* Apparently, Webb did not file a formal complaint with the Equal Employment Opportunity Commission until January 1986, based upon his job reclassifi-

Although we agree with the district court's dismissal of claims relating to events prior to 1985, the court erred in dismissing the remainder of the complaint. If a court concludes that a complaint should be dismissed sua sponte for failure to state a claim, the parties must be given both notice of the court's intention and an opportunity to respond. Ricketts v. Midwest Nat'l Bank, 874 F.2d 1177 (7th Cir. 1989). See also Tingler v. Marshall, 716 F.2d 1109 (6th Cir. 1983); Bayron v. Trudeau, 702 F.2d 43 (2d Cir. 1983); Jefferson Fourteenth Assoc. v. Wometco de Puerto Rico, Inc., 695 F.2d 524 (11th Cir. 1983).

Therefore, we affirm the dismissal

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cation which occurred in October, 1985.

of the pre-1985 claims based on the reasoning of the district court. However, we vacate the order of the district court dismissing the remainder of the complaint and remand in order to give Webb an opportunity to respond to the court's intention to dismiss.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED IN PART, VACATED IN PART AND REMANDED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH COURT

FILED
October 23, 1990

No. 90-2106

SONNY BOY WEBB,

Plaintiff - Appellant,

versus

ENVIRONMENTAL PROTECTION AGENCY; LEE M. THOMAS; WILLIAM REILLY,

Defendants - Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

s/John M. Greacen
CLERK

Rec'd 10/25/90
s/S. B. Webb

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
UNITED STATES COURTHOUSE
TENTH 7 MAIN STREEST
RICHMOND, VIRGINIA 23219

JOHN M. GREACEN
CLERK

TELEPHONE
(804) 771-2213

October 27, 1990

Sonny Boy Webb
2907 Wadsworth Avenue
Durham, NC 27707

Re: 90-2106 Webb v. EPA
CA-89-18-D-C

Dear Mr. Webb:

You have filed a bill of costs for this appeal. This court only awards costs pursuant to Rule 39 of the Federal Rules of Appellate Procedure and when the parties have filed formal briefs and a joint appendix. Because this case was informally briefed pursuant to Local Rule 34(b), no costs will be allowed for this appeal.

Yours truly,

JOHN M. GREACEN
Clerk

By:s/Deborah A. Davenport
Deborah A. Davenport
Deputy Clerk

cc: Harry L. Hobgood

UNITED STATES COURT OF APPEALS

FOR THE FOURTH COURT

FILED
October 23, 1990

No. 90-2106

Webb v. EPA

M A N D A T E

The judgment of this court dated 9/27/90 takes effect today.

JOHN M. GREACEN
CLERK

Before the
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
CHARLOTTE DISTRICT OFFICE
EEOC Case No. 045-87-X0045
Agency Case No. 86-0020-NC

SONNY B. WEBB,	)
Complainant,	)
vs.	)
U.S. ENVIRONMENTAL PROTECTION AGENCY,	)
Agency.	)

The above-entitled matter came on for hearing on January 27th, 1988, at 3:00 p.m. at the Office of Administration, Environmental Protection Agency, Research Triangle Park, North Carolina, before Regan Miller, Administrative Law Judge, Equal Employment Opportunity Commission, Charlotte District Office.

Reported by: Margaret M. Powell/Court Reporter
2918 Barmettler Street
Raleigh, NC 27607
(919) 832-2284

Volume 3 of 3

A P P E A R A N C E S

Administrative Law Judge Regan Miller
Equal Employment Opportunity Commission
5500 Central Avenue
Charlotte, NC 28212

MR. ANTHONY G. BEYER
Attorney-Advisor
Office of General Counsel
U. S. Environmental Protection Agency
Research Triangle Park, NC 27711
(For the Agency)

MR. SONNY B. WEBB, pro se

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Sonny B. Webb 6

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fact that ninety percent of the FOIA requests came to Contracts Management Division and that the monitoring and the coordination activities should not be resident in a division other than the Contracts Management Division. Similarly, the Managment rationale of Mr. Westmorland in terms of his listing of computer programs needed to provide the various Property and Supply Management reports indicate that those programs have been acquired from contractors and that there is currently no need for ongoing programming. As much as Mr. Webb would like to perform that function, it is not needed by the Branch.

Mr. Webb, I believe and the record

will indicate, has failed to introduce any evidence which would indicate that these business reasons advanced were merely a pretext for a discriminatory reason. Mr. Webb's Complaint, I believe, should be dismissed.

ALJ MILLER: Okay. At this time, as I indicated to the parties I will render a Bench Decision in this case.

RECOMMENDED DECISION

ALJ MILLER: Pursuant to the Equal Employment Opportunity approval of decisions from the Bench in Federal Sector Complaint Hearings, I am hereby informing the parties that I have determined that the instant Complaint is

appropriate for the issuance of a Bench Decision based on the following:

Number one, the Complaint involves

clearly defined issues;

Number two, the Investigation contains all relevant documents and statements, and any material defects have been cured during this hearing and; EXCEPTION NO. 5.

Number three, the Complaint involves the disparate treatment theory of discrimination.

Therefore, I will now proceed to render my recommended decision in the instant Complaint on the record.

Pursuant to Section 1613.218 of the Commission's Regulations, a hearing was conducted in this matter beginning on December 14th, 1987, and concluding on January 27, 1988, at the Environmental Protection Agency Office in the Research Triangle Park, North Carolina, on the Discrimination complaint filed by Mr.

Sonny Webb, who is currently an Inventory Management Specialist GS-7 at the facility.

Mr. Webb alleged that he was discriminated against because of his race, religion and handicap when he was reassigned to the position of Inventory Management Specialist from his position as Computer Programmer, GS-7,

in October of 1985.

Nine witnesses testified at the hearing and twenty additional exhibits were added to the record. The following is a chronology of the events which led to this hearing:

EEO counseling was sought by the Complainant on November 8th, 1985. Such counseling concluded on January 17th, 1986. Complainant filed his formal

Complaint of Discrimination on January 31st, 1986. The Agency attempted an informal settlement on October 2nd, 1986, and issued its proposed decision on January 14th, 1987.

Complainant requested a hearing on January 21st, 1987, and the Agency requested the services of an Administrative Judge on February 4th, 1987.

The issue involved in the instant Complaint is whether Complainant was reassigned to the position of Inventory Management Specialist from the position of Computer Programmer, GS-7, in October 1985 because of race, religion and/or handicap.

Based upon the evidence contained in the investigative file as well as the testimony and evidence produced during

the hearing, I make the following findings of fact:

FINDINGS OF FACT

DECISION - ALJ MILLER PAGE 57

Complainant has been employed with the Agency since 1974. He is a Black male with a speech impediment and describes himself as a disciple of Jesus Christ with respect to his religious affiliation.

In 1976 the Information Services Division of the Agency was abolished as part of a reorganization of the local Agency facility. Complainant was given a sixty-day detail to the position of Inventory Management Assistant , EXCEPTION NO. 6. GS-5, under the supervision of Allen P. Baker, Jr., white.

In May of 1976, Complainant was reassigned to the permanent position of Supply Clerk, GS-5. From the time of this reassignment, Complainant has had a continual disagreement with his supervisors about what he believed to be a misclassification of his job position in relation to the duties which he actually performed.

This dispute led to the filing of a formal Discrimination Complaint in December of 1977. This Complaint was resolved based upon an opinion letter dated April 13, 1978, from the Agency's Headquarters. This opinion letter recommended that Complainant's position be upgraded with respect to title, series and grade to Computer Programmer, GS-334-7, with no known promotion potential. EXCEPTION NO. 7

A position description number 3744 was formulated

which described Complainant's duties in this new position. Complainant was the only person in his division with this particular job title.

In 1982 a new performance evaluation system was adopted by the Agency for all employees. Allen Baker, who was still Complainant's supervisor, was required to write performance standards based upon Complainant's actual job duties. When these performance standards were shown to Complainant, he again disagreed with the emphasis seemingly placed on the clerical duties which he performed as opposed to those duties requiring use of his technical knowledge, particularly

the knowledge concerning computer programming.

Baker requested that Complainant write his own performance standards. The standards proposed by Complainant were not adopted by Baker.

In October 1984, a set of performance standards were written by Baker and were found to be acceptable by Complainant. However, one of the critical job elements and one standard were removed by the Director of General Services, Mr. Charles J. Foster, white, when the standards were submitted for his review and approval. Complainant agreed to the change in the standard, but not as to the critical element, and allowed Baker to evaluate him based upon these modified performance standards.

In 1985, Dave Westmorland, white, became Chief of the Property and Supply Management Branch. Westmorland began reviewing all of the job positions within his Branch in preparation for a reorganization. He became aware that the Branch would be audited and was specifically concerned that Complainant's job would not withstand a desk audit.

Such an audit was performed by Michael Thorne, white, a Personnel Management Specialist. Thorne found Complainant's title and series to be in variance with the duties which he actually performed.

Specifically, Thorne found that Complainant did not spend a significant amount of his time engage in the type of

computer programming described for the 334 Computer Programmer series. He did not recognize the programs which Complainant had created to generate reports on his FOIA functions and his Supply Clerk functions as being the type of programming described in the 334 series. He found that, although Complainant had originally created these programs, he was not actively involved on a daily basis or for any significant amount of time in developing computer programs for use by his Branch.

Thorne concluded that Complainant should be more accurately classified as a Supply Clerk-2005-6, and recommended the same to Westmorland.

Subsequent to the desk audit, Complainant was informed that he would

no longer have any responsibilities with respect to the FOIA requests. These would be completely performed by Ernest Caldwell, white, a member of the Contracts Management Division. This was determined to be appropriate since most of the FOIA requests were directed towards the Contracts Management Division and Complainant's function was one of the primarily preparing unnecessary weekly reports and providing Agency numbers of each request.

In response to Thorne's recommendation, Westmorland sought to rewrite Complainant's job description in such a manner as to allow him to retain his GS-7 pay grade.

On October 13, 1985, Complainant was officially reassigned to the Inventory Management Specialist

position, GS-7.

Complainant at this time is not performing responsibilities as a Computer Programmer. Any assistance in this area is being obtained from a systems programming standpoint through a private contractor and from Mr. John Knight, white, who is a Computer Programmer in the Office of Data Processing, Information Services Division.

Westmorland determined that this was the most

efficient use of this personnel resources and has at all times acted in a manner which preserves his existing work force at their current pay grade levels.

In summary, there has been an ongoing battle concerning the manner in which Complainant's job duties have been described. Complainant has desired descriptions which emphasize his technical knowledge regardless of whether the knowledge is actually required in performing his assigned tasks. Whereas, Management officials have focused on the actual task based upon the needs of the Agency. In essence, the Complainant may have the knowledge, skills and abilities to be a Computer Programmer, but his department has not needed a Computer Programmer since at least October of 1985.

Based upon the foregoing Findings of Fact, I make the following Conclusions of Law:

CONCLUSIONS OF LAW

All procedural prerequisites to the convening of this hearing have been met.

Complainant has the burden of establishing that the Agency has engaged in unlawful discriminatory conduct. He may meet this burden by establishing through direct evidence the existence of a discriminatory animus with respect to Agency officials. Or he may rely on an indirect . . .

Respectfully submitted this

14th day of February, 1991.

Sonny B. Webb

Sonny B. Webb, pro se

Petitioner for Petitioner

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